80-1435

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

v.

JAMES O. GORMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

v.

JAMES O. GORMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether a discharged military exchange employee who was appointed to his position may bring a civil action for monetary damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), predicated upon an implied-in-fact contract.

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The Solicitor General, on behalf of the Army and Air Force Exchange Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is reported at 619 F.2d 1141.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 4a-5a) was entered on June 27, 1980. A petition for rehearing was denied on September 26, 1980 (App. D, *infra*, 6a-7a). On December 18, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2) provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

> liquidated or unliquidated damages in cases not sounding in tort. For the purposes of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The pertinent regulations are set forth in the appendix to the petition in *Army and Air Force Exchange Service* v. *Sheehan* (Pet. App. 22a-35a).

STATEMENT

Respondent was an appointed employee who served as a merchandising specialist for the Army and Air Force Exchange Service (AAFES).[1] On March 22, 1977, the AAFES formally notified respondent that he would be discharged for cause. Respondent's discharge was sustained upon administrative review (App. A, *infra*, 1a).

Respondent then commenced this action in the United States District Court for the Northern District of Texas, contending that his discharge was arbitrary, capricious, unsupported by substantial evidence, an abuse of discretion, and in violation of pertinent regulations and the Due Process Clause of the Fifth Amendment. Respondent sought, *inter alia*,

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[1] The AAFES is a nonappropriated fund instrumentality, which means that it does not receive its monies by congressional appropriation. See 10 U.S.C. 4779(c), 9779(c).

monetary damages including back pay.[2] The district court dismissed the action for lack of subject matter jurisdiction (App. B, *infra*, 3a).

The court of appeals reversed (App. A, *infra*, 1a-2a), on the basis of its opinion in *Sheehan* v. *Army and Air Force Exchange Service*, 619 F.2d 1132 (1980). In *Sheehan*, on facts virtually identical to this case, the court of appeals held that the district court had jurisdiction over the plaintiff's claims for monetary relief pursuant to the 1970 amendment to the Tucker Act, 28 U.S.C. 1346(a)(2), which confers jurisdiction over claims founded upon express or implied contracts with certain nonappropriated fund instrumentalities, including the AAFES (619 F.2d at 1137-1138). The court acknowledged the AAFES' argument that the plaintiff's action could not be based on a breach of contract theory because under governing regulations the plaintiff served by appointment rather than by contract (*id.* at 1137). But the court concluded that "[e]ven if the regulations label the *commencement* of [the plaintiff's] employment as pursuant to 'appointment,'" the AAFES' regulations concerning discharge procedures "were part of a collateral implied in-fact contract between [the plaintiff] and the AAFES that the AAFES would adhere to the regulations in its dealings with him" (*id.* at 1137-1138). Accordingly, the court ruled that the plaintiff's allegation that his discharge violated controlling regulations was equivalent to an allegation of a breach of an implied-in-fact contract, and that such a

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[2] Respondent also sought reinstatement and all benefits of employment of which he had been deprived as a result of his discharge.

claim was sufficient under the Tucker Act to avoid dismissal on jurisdictional grounds (*id.* at 1138).[3]

REASONS FOR GRANTING THE PETITION

The court of appeals in this case relied entirely on its decision in *Sheehan* v. *Army and Air Force Exchange Service, supra,* in holding that the district court had subject matter jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), to consider respondent's claim for monetary relief for his allegedly unlawful discharge. For the reasons set forth in our petition for a writ of certiorari in *Army and Air Force Exchange Service* v. *Sheehan,* we submit that both *Sheehan* and the decision below are incorrect. In light of the manifest error of the court of appeals' decision in *Sheehan,* we have requested the Court in that case to grant the petition for certiorari, reverse the judgment of the court of appeals and remand the case to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief. The Court should dispose of this case in a like manner.

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[3] The court of appeals, in *Sheehan* (619 F.2d at 1138-1140) and in this case (App. A, *infra,* 2a), also held that the district court had jurisdiction over the plaintiffs' claims for nonmonetary relief pursuant to 28 U.S.C. 1331 and that the requisite waiver of sovereign immunity was provided by the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702. We have not sought review of this aspect of the court of appeals' decisions.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of the petition for certiorari in *Army and Air Force Exchange Service* v. *Sheehan.*

Respectfully submitted.

WADE H. MCCREE, JR.
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FEBRUARY 1981

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-1495

JAMES O. GORMAN, PLAINTIFF-APPELLANT

v.

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT-APPELLEE

June 27, 1980

Appeal from the United States District Court for the Northern District of Texas.

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

As in *Sheehan* v. *Army & Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980), the sole issue on this appeal is whether the district court possessed subject matter jurisdiction to consider an action alleging wrongful discharge. This suit was initiated by James Gorman against the Army & Air Force Exchange Service ("AAFES") after administrative remedies proved futile.

Gorman was employed as a merchandising specialist with the AAFES in its Executive Management Program. He received final notice of separation and thereafter exhausted administrative appeal. Suit was filed in the district court against the AAFES alleging that the discharge was (1) arbitrary and capricious

and an abuse of discretion, (2) not in accordance with the AAFES personnel rules and regulations, (3) a deprivation of due process, and (4) not supported by substantial evidence. Gorman sought reinstatement; back pay, along with restoration of all other employment benefits; an attorney's fee; and costs. The district court dismissed the suit for want of subject matter jurisdiction.

Today in *Sheehan* we hold that the district court had subject matter jurisdiction for a virtually identical suit under a confluence of 28 U.S.C. §§ 1331(a), 1346(a)(2) (1976) and 5 U.S.C. § 702 (1976). Although sections 1331(a) and 1346(a)(2) were not specified as bases for jurisdiction in Gorman's complaint, since the allegations meet the statutory requirements, the lower court had jurisdiction despite the omission. *See Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607 n.6, 98 S.Ct. 2002, 2005 n.6, 56 L.Ed.2d 570 (1978); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744 n.9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591 (1975). For the reasons stated in *Sheehan*, we hold that the lower court had subject matter jurisdiction.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-78-0304-F

JAMES O. GORMAN, PLAINTIFF

v.

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT

[Filed Jan. 15, 1979]

ORDER

THIS DAY came before the Court for hearing Defendant's Motion to Dismiss or in the Alternative for Summary Judgment, and it appearing to the Court that the Court is without jurisdiction to entertain this suit for the reasons stated in defendant's motion, it is hereby

ORDERED, ADJUDGED and DECREED that the complaint be and hereby is dismissed with prejudice; costs to be awarded to defendant.

/s/ Robert W. Porter
United States District Judge

Dated: January 15, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 79-1495

D. C. Docket No. 3-78-0304-F

JAMES O. GORMAN, PLAINTIFF-APPELLANT

versus

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT-APPELLANT

Appeal from the United District Court
for the Northern District of Texas

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that the defendant-appellee pay to the plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

June 27, 1980

Issued as Mandate: Jul. 23, 1980.

Reissued as Mandate: October 8, 1980.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1495

JAMES O. GORMAN, PLAINTIFF-APPELLANT

versus

ARMY AND AIR FORCE EXCHANGE SERVICE,
DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Northern District of Texas

[Filed Sep. 26, 1980]

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion 6-27-80, 5 Cir., 198—, —— F.2d——).

(September 26, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active

service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

Form 704-2

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NO. 80 - 1435

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

JAMES O. GORMAN
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED

Whether the District Court possessed subject matter jurisdiction to consider an action by a discharged military exchange employee alleging a wrongful discharge.

CERTIFICATE OF INTERESTED PARTIES

The undersigned, attorneys of record for Respondent James O. Gorman, certify that the following listed parties have an interest in the outcome of this case:

PARTIES:

1. James O. Gorman, Respondent.
   209 Shadybrook
   De Soto, Texas 75115

2. Army and Air Force
   Exchange Service Petitioner.
   3911 South Walton Walker
   Dallas, Texas 75222

The undersigned counsel certify that the following attorneys have an interest in the outcome of this case on behalf of their respective clients.

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By Edward B. Cloutman, III per a.s.
Edward B. Cloutman, III

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NO. 80 - 1435

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
Petitioner

VERSUS

JAMES O. GORMAN
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Petitioner's Appendix A, infra, 1a - 2a) is reported at 619 F. 2d 1114.

JURISDICTION

The judgment of the court of appeals (Petitioner's Appendix C) was entered on June 27, 1980. A petition for rehearing was denied on September 26, 1980 (Petitioner's Appendix D). On December 18, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 23, 1981. Thereafter the Clerk of the Court extended the time for filing a brief in opposition to and including April 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. §1346 (a) (2) provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an excutive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with United States.

The Administration Procedure Act, 5 U.S.C. §702 (1976) provides in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action is a court of the United States seeking relief other than money damage and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United

States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Provided, That any mandatory or injunctive decree shall specify the Federal office or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. §1331(a) (1976) provides in pertinent part:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, an agency thereof, or any officer or employee thereof in his official capacity.

STATEMENT

Respondent Gorman was employed as a merchandising specialist with the AAFES in its executive management program. Respondent received final notice of separation and thereafter exhausted administrative appeal.

Respondent then commenced this action in the United States District Court for the Northern District of Texas, contending that his discharge was arbitrary, capricious and an abuse of agency discretion, not in accordance with AAFES personnel rules and regulations, not supported by substantial evidence, and that the discharge deprived Respondent of a property interest in his continued employment with AAFES without due process of law in violation of the Fifth Amendment to the Constitution of the United States. Respondent sought reinstatement to his prior position with AAFES, back pay and all other rights and benefits of employment of which he had been unlawfully deprived, court costs and attorney's fees. The district court dismissed this action without an evidentiary hearing for lack of subject matter jurisdiction (Petitioner's App. B).

The Court of Appeals reversed (Petitioner's App. A) on the basis of its opinion in *Sheehan v. Army and Air Force Exchange Service*, 619 F. 2d 1132 (1980). The Court of Appeals held that the district court had subject matter jurisdiction under a confluence of 28 U.S.C.§1331(a), §1346 (a) (2) (1976) and 5 U.S.C.§702 (1976). Accordingly, the Court of Appeals reversed the judgment of the district court and remanded this action.

REASONS FOR DENYING THE PETITION

Petitioner Army and Air Force Exchange Service asserts that the decision of the Court of Appeals warrants review by this Court due to its "manifest error . . . and the significance

of the issue concerning the scope of federal court jurisdiction under the Tucker Act" (Petition for Writ, p. 5). Petitioner misinterprets the decision below since a careful analysis of the action of that Court shows it to be in accordance with the applicable caselaw of this Court including those cases which Petitioner cites as controlling, ***United States v. Hopkins***, 427 U.S. 123 (1976), and ***United States v. Testan***, 424 U.S. 392 (1976).

As the Court of Appeals carefully stated from the first sentence of its opinion in the instant case to the last sentence of its opinion in the companion case of ***Sheehan v. Army and Air Force Exchange Service***, 619 F. 2d 1132 (1980), "[t]he sole issue on this appeal is whether the district court possessed subject matter jurisdiction to consider an action alleging wrongful discharge" (Petition for Writ, App. A, p. 1a). "We travel no further and should not be understood to intimate any opinion on the merits", ***Sheehan, supra*** at 1141. The Court of Appeals correctly decided the jurisdictional issue and properly remanded this case to the district court for a decision on the merits. Such action is clearly in agreement with the direction of this Court. Only last year, in the analogous case of ***Hatzlachh Supply Co. v. United States***, 444 U.S. 460 (1980), this Court remanded that action because the Court of Claims [District Court herein] should first assess "whether there is an implied-in-fact contract of bailment upon which the United States is liable in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act", ***id***, 465. See also, ***United States v. Clark***, _____ U.S. _____, 63 L. Ed. 2d 171, 100 S. Ct. _____ (1980) (J. Rehnquist, dissenting).

Petitioner asserts that this Court's decision in ***Hopkins, supra***, is incompatible with the determination of the Court of Appeals that the district court had jurisdiction over Plaintiff Gorman's contract claims pursuant to the Tucker Act (Petition

for Certiorari, pp. 4-5, 8-9). To the contrary, *Hopkins* supports the Court of Appeals' finding of jurisdiction. In upholding the right of Hopkins, a discharged AAFES employee, to bring his action under the Tucker Act, 28 U.S.C. §1346, *et seq.*, this Court sets forth that such Act is applicable to any express or implied contract, including employment contracts. *Hopkins, supra*, at 126. As Petitioner failed to point out, this Court held that, "Plaintiff's allegation that his discharge constituted a breach of a contract of employment was sufficient, under the provisions of Pub. L. 91-350 [1970 amendments to Tucker Act, 28 U.S.C.A. §1346(a)(1)] to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims, and the judgment of the Court so holding is therefore affirmed", *Hopkins, supra*, at 130.

As in any breach of contract action, resolution of the further issues concerning the terms of such contract and the alleged breach of the contract by the Defendant await the trial on the merits in the district court. As stated by this Court in *Hopkins*, the issue of whether "Plaintiff held his position by virtue of an express or implied contract. . . depends upon an analysis of the statutes and regulations previously described *in light of whatever evidence is adduced on remand* as to Plaintiff's particular status in this case" (emphasis added) *supra*, at 129, 130.

No evidentiary hearing of any type has yet been held by the district court herein. The only facts pertinent to this petition are those raised by the pleadings below and these facts are sufficient to confer jurisdiction under the teachings of *Hopkins* set forth hereinabove.

Petitioner's reliance upon this Court's decision in *United States v. Testan*, 724 U.S. 392 (1976), is equally misplaced. *Testan* dealt with the claims of two civil service employees that their positions of employment were erroneously classi-

fied and that they were entitled to reclassification and back payment of the salary to which they deemed themselves entitled. This Court held that those employees failed to show any substantive right to such higher classification of employment. As this Court stated in discussing each of the various statutes put forth by the *Testan* employees as conferring substantive rights, "the Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity. The respondents do *not* rest their claims upon a *contract*" (emphasis added), *Testan, supra*, at 400.

Plaintiff herein, as one of several bases for relief, does rest his claim upon a contract: the contract of employment implied from the facts of the conduct of the parties herein in light of their surrounding circumstances. See *Porter v. United States*, 496 F. 2d 583, 590 (Ct. Cl. 1974), cert. denied 420 U.S. 1004 The validly enacted regulations of Petitioner AAFES pertaining to the dismissal of employees are part of that implied contract 1/ and the Tucker Act as well as the confluence of 28 U.S.C. §1331(a) and 5 U.S.C. §702 (1976) confers jurisdiction on the district court to enforce Plaintiff's rights under that implied-in-fact contract.

Further, one specie of the relief sought by Plaintiff herein, back pay for the unlawful termination of his federal employment (Petition for Writ, App. A, p. 2a), is directly analogous to "an action for back pay occasioned by a wrongful dismissal from the civil service" which the Court in *Eastport Steamship Corp. v. United States*, 372 F. 2d 1002, (Ct. Cl. 1967), cert. denied, 399 U. S. 911 (1970), cites as the type of case in which " 'a claimant who says he is entitled to money from the United

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1/ See *Aycock-Lindsey Corp. v. United States*, 171 F. 2d 518, 520-21 (5th Cir. 1948), cf. *Bodeck v. Department of Treasury*, 532 F. 2d 277, (2 Cir. 1976) cert. denied, 429 U. S. 849 (1976).

States because a statute or a regulation (or the Constitution) grants him that right, in terms or by implication, can properly come to the Court of Claims at least if his claim is not frivolous but arguable' *Ralston Steel Corp. v. United States*, 340 F. 2d 663, 667 (Ct. Cl. 1965) cert. denied 381 U.S. 950, 85 S. Ct. 1803, 14 L. Ed. 2d 723" *id*, at 1008. This Court in *Testan* cities *Eastport* as correctly setting forth "these established principles", *Testan, supra*, at 400.

The conclusion of this Court in *Testan* that "neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classification", 424 U.S. at 407, certainly does not lead to Petitioner's conclusion that Plaintiff herein cannot state a cause of action cognizable under the Tucker Act and under the jurisdictional grant of 28 U.S.C. §1331(a) (1976) coupled with the cause of action and waiver of sovereign action contained in the Administrative Procedures Act, 5 U.S.C. §701, *et seq.* See *Jaffee v. United States*, 592 F. 2d 712, 718-719 (3 Cir. 1979) cert. denied 441 U.S. 961 (1979). As this Court stated, "[t]here is no claim here that either respondent has been denied the benefit of the position to which he was appointed. The claim, instead, is that each has been denied the benefit of a position to which he should have, but was not appointed" *Testan, supra*, at 402. Plaintiff Gorman's situation is distinguishable in all respects, it being "one concerning a wrongful discharge or a wrongful suspension. In that situation, at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified. *United States v. Wickersham*, 201 U.S. 390 (1906)", *Testan* at 402. 2/

2/ In *Wickersham*, long before the passage of the Back Pay Act, 5 U.S.C. §5596, an appointed employee discharged counter to the requirements of an executive order was held to have a cause of action over which the Court of Claims had jurisdiction.

Further this Court, with the benefit of its prior decision within the same term in ***Testan***, granted certiorari in ***Hopkins*** for the express purpose of resolving the issue of whether a discharged AAFES employee could assert jurisdiction under the Tucker Act based upon an implied contract of employment. ***Hopkins, supra,*** at 124. As previously stated, this Court did find such jurisdiction in accordance with the principles set forth in ***Testan*** and the same statutes and regulations invovled in the instant case.

Petitioner also neglects to point out the vital fact that the Court of Appeals found that the district court had jurisdiction over Plaintiff's action not under just the Tucker Act, but rather under a confluence of 28 U.S.C. §1331(a), §1346(a) (2) (1976) and 5 U.S.C. §702 (1976) (Petition for Writ, App. A, p. 1a). Petitioner, of course, no longer questions the jurisdiction of the district court pursuant to 28 U.S.C.§1331(a) and 5 U.S.C. §702 (1976), but rather petitions this Court solely to review the issue of monetary relief under the Tucker Act.

The addition to the Administrative Procedures Act to which the Court of Appeals looked for jurisdiction and a waiver of sovereign immunity over certain of Plaintiff's claims, 5 U.S. C. §702 (1976), was enacted ***after*** this Court's decisions in both ***Hopkins*** and ***Testan***. That statute "is cast as a blanket waiver of sovereign immunity as to a broad category of actions against the government . . .", ***Hill v. United States,*** 571 F. 2d 1098 (9th Cir. 1978) and gives Plaintiff, in conjunction with the jurisdictional grants of 28 U.S.C. §1331(a) and 28 U.S.C. §1346(a), the right to maintain a cause of action in the district court to vindicate his substantive rights pursuant to his contract of employment, the applicable AAFES regulations, and the due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. See ***Whiskers v. United States,*** 600 F. 2d 1332 (10 Cir. 1979) and ***Beller v. Middendorf***, 632 F. 2d 788 (9th Cir. 1980).

Further, since Plaintiff's claim also arises under the due process clause of the Constitution, a cause of action and damage remedy can be implied directly under the Constitution and the Fifth Amendment waives sovereign immunity. *Davis v. Passman*, 442 U.S. 228 (1979), *Carlson v. Green*, _____ U.S. _____, 64 L. Ed. 2d 15, 100 S. Ct. _____ (1980).

For the reasons set forth hereinabove, the district court properly has jurisdiction over Plaintiff's claims under several bases of jurisdiction and there is no error or conflict in the courts below which would warrant this petition for certiorari being granted.

CONCLUSION

Wherefore, for the foregoing reasons, Respondent Gorman respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on the following counsel of record in this case at the addresses shown by placing same in the United States Mail, postage prepaid, on this the 23rd day of April, 1981:

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No. 80-1435

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE, PETITIONER

v.

JAMES O. GORMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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The narrow question presented by this case and its companion, *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (filed Feb. 23, 1981), is whether an appointed employee of a military exchange who has been discharged may file a civil action for monetary damages against the United States under the Tucker Act (28 U.S.C. 1346(a)(2)) predicated upon an implied-in-fact contract. As we demonstrated in our petition in *Sheehan* (80-1437 Pet. 4-14), the court of appeals' holding that Tucker Act jurisdiction may be invoked in such a situation is inconsistent with this Court's decisions in *United States* v. *Hopkins*, 427 U.S. 123 (1976), and *United States* v. *Testan*, 424 U.S. 392 (1976). Respondent Gorman's arguments in response are entirely unpersuasive.

1. Respondent's contention (Br. in Opp. 5-6) that the decision in *Hopkins* supports the court of appeals' decision in this case and in *Sheehan* is mistaken. Respondent to the

contrary, the Court in *Hopkins* did not "uphold[] the right of Hopkins * * * to bring his action under the Tucker Act" (Br. in Opp. 6). Instead, the Court held (427 U.S. at 130) that further proceedings were necessary because the record was insufficient to establish whether Hopkins "was employed by virtue of a contract," in which case jurisdiction would lie under the Tucker Act, or "by appointment," in which case the Tucker Act presumably would afford no basis for jurisdiction over Hopkins' claim.

Respondent is not aided by the Court's statement in *Hopkins* that "[p]laintiff's allegation that his discharge constituted a breach of a contract of employment was sufficient, under the provisions of Pub. L. No. 350, to withstand the Government's motion to dismiss the complaint on the grounds of lack of jurisdiction in the Court of Claims, and the judgment of the court so holding is therefore affirmed." 427 U.S. at 130. Unlike the complaint in *Hopkins*, respondent's complaint does not allege that he was employed pursuant to a contract with the exchange service or that "his discharge constituted a breach of a contract of employment" (*ibid.*).[1] As we noted in our petition in *Sheehan* (80-1437 Pet. 9 n.8), subsequent to this Court's decision in *Hopkins*, the Court of Claims has, on two occasions, dismissed suits for back pay brought by discharged exchange service employees under the Tucker Act on the ground that the complaints failed to allege facts establishing a contract relationship and that therefore the court was without subject matter jurisdiction over the actions. See *Spooner* v. *United States*, 211 Ct. Cl. 312 (1976); *Richardson* v. *United States*, 214 Ct. Cl. 757 (1977). Accordingly, we submit that, consistent with *Hopkins*, the complaint in this case was not sufficient to withstand the government's motion to dismiss.

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[1]Similarly, the complaint in *Sheehan* does not allege that Sheehan's discharge was contrary to an employment contract (see 80-1437 Pet. App. 8a).

2. Respondent contends (Br. in Opp. 8) that this case is distinguishable from *United States* v. *Testan, supra,* because, unlike the plaintiffs in *Testan,* who asserted that they had been erroneously classified, respondent claims that he was wrongfully discharged. The Court in *Testan* did indeed differentiate between a suit seeking reclassification and one "concerning a wrongful discharge or a wrongful suspension." 424 U.S. at 402. In the latter situations, the Court observed that, "at least since the Civil Service Act of 1883, the employee is entitled to the emoluments of his position until he has been legally disqualified." 424 U.S. at 402, citing *United States* v. *Wickersham,* 201 U.S. 390 (1906).

But the protections of the Civil Service Act are not applicable here. As we pointed out in our petition in *Sheehan* (80-1437 Pet. 6 n.5, 12-13), pursuant to 5 U.S.C. (Supp. II) 2105(c), exchange service employees are specifically excluded from coverage under the Back Pay Act, 5 U.S.C. (& Supp. III) 5596, and (with several exceptions not pertinent here) from coverage under other statutes administered by the Office of Personnel Management (formerly the Civil Service Commission).[2]

3. In its brief opinion in this case the court of appeals noted (Pet. App. 2a) that it held in *Sheehan* that the district court had subject matter jurisdiction "under a confluence"

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[2]The predecessor to Section 2105(c), 5 U.S.C. (1964 ed.) 150k, was enacted in order to allay doubts raised by this Court's decision in *Standard Oil Co.* v. *Johnson,* 316 U.S. 481 (1942), "as to whether or not the various Civil Service laws and regulations were applicable to civilian employees of non-appropriated fund activities." *United States* v. *Forfari,* 268 F. 2d 29, 32 (9th Cir.), cert. denied, 361 U.S. 902 (1959). See S. Rep. No. 1341, 82d Cong., 2d Sess. (1952); H.R. Rep. No. 1995, 82d Cong., 2d Sess. (1952). As originally enacted, the statute provided that civilian employees of nonappropriated fund instrumentalities "shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission * * *." 5 U.S.C. (1964 ed.) 150k.

of 28 U.S.C. 1331(a), 28 U.S.C. 1346(a)(2) and 5 U.S.C. 702. On the basis of this reference, respondent appears to assert (Br. in Opp. 7, 9) that the court of appeals concluded that 28 U.S.C. 1331(a) and 5 U.S.C. 702 help to confer jurisdiction in the district court over his claim for monetary relief. This apparent assertion is incorrect.

The court in *Sheehan* held (80-1437 Pet. App. 11a) that 28 U.S.C. 1331(a) is not by itself a waiver of sovereign immunity but that such a waiver may be found in 5 U.S.C. 702 for claims seeking equitable relief. However, as the court below recognized (80-1437 Pet. App. 12a), Congress in Section 702 expressly declined to waive sovereign immunity over monetary claims. By its terms, Section 702's waiver provision applies only to federal court actions "seeking relief other than money damages."

4. Finally, respondent argues (Br. in Opp. 10) that his complaint alleges a due process violation and that, under *Davis* v. *Passman*, 442 U.S. 228 (1979), and *Carlson* v. *Green*, 446 U.S. 14 (1980), this allegation is sufficient to support a cause of action for damages against the United States. But waivers of sovereign immunity must be "unequivocally expressed" (*United States* v. *King*, 395 U.S. 1, 4 (1969)), and there is nothing in the Due Process Clause of the Fifth Amendment that waives the immunity of the United States to be sued for damages. See *Duarte* v. *United States*, 532 F. 2d 850 (2d Cir. 1976). Both *Davis* and *Green* were actions against individual federal officials, not against the government or one of its agencies, and any adverse money judgment in those cases would have been paid by the officers personally and not by the federal government. Those cases thus provide no support for respondent's argument. In short, as this Court concluded in *Testan*, *supra*, "[i]n a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument * * *

that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." 424 U.S. at 400-401.

For the foregoing reasons and for the reasons stated in our petition for a writ of certiorari in *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be reversed, and the case should be remanded to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief.

Respectfully submitted.

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